This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

A 449800

ATURE AND FORM
F THE AMERICAN GOVERNMENT

GEORGE SHEA

1837
ARTES
VERITAS
SCIENTIA
LIBRARY OF THE
UNIVERSITY OF MICHIGAN
E PLURIBUS UNUM
SI QUAERIS PENINSULAM AMOENAM
CIRCUMSPICE

JK
21
.S59
1883

# THE NATURE AND FORM

OF THE

# AMERICAN GOVERNMENT

FOUNDED IN THE

# CHRISTIAN RELIGION.

BY THE

HONORABLE GEORGE SHEA,

CHIEF JUSTICE OF THE MARINE COURT OF THE CITY OF NEW YORK.

BOSTON:
HOUGHTON, MIFFLIN AND COMPANY
New York: 11 East Seventeenth Street.
The Riverside Press, Cambridge.
1883.

Copyright, 1882,
By GEORGE SHEA.

*All rights reserved.*

*The Riverside Press, Cambridge:*
Stereotyped and Printed by H. O. Houghton & Co.

# INTRODUCTORY NOTICE.

THE substance of the following pages was the theme of an address by me before the Dean, the Faculty, and Students of the General Theological Seminary of the United States, delivered at St. Peter's Hall, city of New York, April 18, 1882. I selected the subject, not only because it carries with it valuable and interesting principles, but as, also, appropriate to a time when I was honored by being elected trustee of that institution, and to the place vacated by the death of the distinguished jurist and scholar, the venerable Samuel B. Ruggles. Many of the comments in the text and many of the notes may appear somewhat remote to a direct consideration of the immediate subject, which

is to show the Christian character of our system and plan of governance. Legitimate governments are not made: they are growths; and plants of slow growth, too. They take their health, strength, durability, and complexion more from the atmosphere in which they are cultured than the isolated root from which they spring. The force of origin and association is supreme in forming the immutable character of civil communities. Thus has it been with the genius of our American government; which, even in its federative qualities, is the express image of the ancient Commonwealth of England, as that Commonwealth was the product of Scandinavian civilization, enlightened and tempered by Christianity.

GEO. SHEA.

NEW YORK, *August* 19, 1882.

No. 205 WEST 46TH STREET.

# THE AMERICAN GOVERNMENT

FOUNDED IN THE

# CHRISTIAN RELIGION.

THE nature and character of that system and that form of government — in its religious alliances — common to the people of the United States of America, is the subject which I purpose to consider. I purpose to indicate the origin of those rules of human conduct which may be described, accurately and historically, as the civil polity of our country. For though in parts of our country annexed since the formation of the national Constitution, as Louisiana, Florida, and the Territories of New Mexico, jurisprudences derived, though indirectly, from the Roman Law prevail, yet that Common Law peculiar to the ancient Saxon Commonwealth of England is so

general, that our country, comprehensively, can be spoken of as under the dominion of one common law as well as of a common general government.

The word common, acknowledging and declaring that which is usual, general, public, seems to have been a significant phrase with those to whom England owes her early institutions. The word itself, when used in those institutions, recognizes, and was intended to recognize as established, the People, in their most general and comprehensive sense, as the source of political power, and the public good as the end for which that power is delegated to municipal government.

The Scandinavian founders of nations, in their earliest institutions, dealt with man as free and equal. Free and equal: but not in the sense absurd to reason and pictured by doctrinaires. Subordination is not slavery, nor unnatural. The Puritan poet declares, in his grand harmonious numbers, that even —

"Orders and degrees
Jar not with liberty, but well consist."[1]

Perfect liberty was, in such simple and vigorous institutions, attained and upheld by obedience to the laws of GOD and man; which were esteemed by them, and justly, to be one and the same rule when in application to human society. A superb chapter might have been added by Montalembert to his "History of the Monks of the West," describing the influence of The Church, not as a part of the state government, but as the inspirer, corrector, modifier, the liberating power which, from rude and crude elements, helped to raise and shape the national character of the English people. The Church made the great kings and lawgivers of the Saxon commonwealth, as The Church had, in the elder time, made the great lawgivers, patriots, and kings of the people of Israel. It was such royal law-givers who erected

[1] Milton, *Paradise Lost*, book v., lines 792, 793.

the institutions and declared the laws of their dominion in Britain. This was centuries before the Norman went into England, and centuries before the Institutes of Justinian were heard of in that island. If there can be said to be a genius for civil society, which induces, more than another, towards a republican system of government, it surely is that disposition brought into Britain, from the isles of the Elbe and from the Rhine, by the Jutes, the Angles, and the Saxons. Those several tribes appear to have been originally one nation: Scandinavian in origin, certainly a people speaking the same language.[1] They were

[1] M. Paul du Chaillu is this summer in Norway, engaged in finishing *The History of the Vikings*. The work is founded upon recently disclosed important authentic materials, and likely, in his hands, to cast a sober and certain light upon an epoch of great historical value, now esteemed simply legendary. The history will trace the Scandinavian races, which must include the Norman to their common Phœnician origin, and English institutions to the genius and parentage of Scandinavian polity.

cruel in their enmities,[1] but within the harsh justice of the age; still they were a religiously disposed people, unlike the Mexican aborigines of our own continent, who are inferred to have entirely dissociated the idea of an Almighty Divine Providence from their scheme of governance: and they have faded from the face of the earth before the advance of civilization, like unhealthy night-mists before the morning sun. The tribes that came from the Elbe and Rhine had no king. This, according to the great Lord Somers,[2] de-

[1] "Behold a people cometh from the north country; . . . they are cruel and have no mercy." — *Jeremiah* vi. 22, 23.

[2] "When God gave liberty to his people to make a king, he did neither constitute nor elect any till they desired it, nor commanded them to do it themselves, but left it to their own free will, whether they would have a king or no king; nor were they appointed to take him out of any one line: Every Israelite might be chosen. None but strangers were excluded: and the people were left to the liberty of choosing and instituting any one of their brethren." — *The Judgment of Whole Kingdoms*

notes in an early condition of civil society an accord with the will of GOD. Those tribes, on sudden occasions and afterwards at prescribed periods, selected from among themselves one who should lead them.[1] This is the natural order. They believed that political organization in society had its origin by the human family, and that the family is a divine institution. Beside, they carried this principle of association further, and united in a formidable league with kindred peoples and neighbors: which league continued till after their departure

*and Nations*, etc., p. 31. This pamphlet was reprinted and published (eleventh edition) at Philadelphia, in 1773. Its effect is very evident in the formation of opinion among the leaders of the colonial resistance. There can be no doubt that its frequent publication at that era was part of the plan by which those leaders were diffusing political knowledge throughout the country. Somers had left an ineffaceable impress in the best minds of America.

[1] *History of the Anglo-Saxons*, by Sharon Turner, vol. i., page 182, Appendix, quoting Bede, *Hist. Eccles.* lib. v., ch. x., p. 192.

for Britain, when it gradually dissolved in the fatherland; but, only, again to assert its vitality and its efficacy centuries later in the settlement of Britain.

To such a people, inspired by such principles and obedient to such tendencies, the language signifying a commonalty became habitual. The expression of the thought appears to recur whenever they speak concerning the relations of the people to affairs of state or religion. The State, in their nomenclature, is "The *Common*-wealth;" its body of jurisprudence, "the *Common* Law;" its universal tribunal, "The *Common* Pleas;" — and, when the Scandinavian in Britain became enlightened by the Christian religion, we quickly have "The *Common* Prayer." I know not when that term — as important in literature as it is dear to The Church — was first used. Surely before the time of Alfred the Great: for I find him relating, that "south of the Humber there were few

priests, indeed," he says, "when I began my reign, who could understand the meaning of their common-prayer; or translate a line of Latin into English." [1]

There began the mission of "a Free Church in a Free State." [2] There we will see evolved the energizing elements of that national character, which has won for Great Britain its commanding position among European dominions and sovereignties in modern times; and to which elements the people of the United States, by lineal right, have succeeded, conformed, and possess.

The unwritten, traditional Constitution of England acknowledges the omnipotence and providence of GOD. But this it does in its traditions, maxims, common-law, and throughout the administration of government. It "acknowledges" GOD; does not legislate the existence of GOD.

[1] Palgrave's *History of the Anglo-Saxons*, p. 163.

[2] Among the last words uttered by De Tocqueville.

The existence of GOD is "presupposed," as Richard Hooker would say, by the *idea* of law and government.[1] In the written Constitution of this our own country, taken together with "the laws in *pursuance* thereof," — as we, to attain a like end, take the unwritten Constitution of England, — we have a similar acknowledgment of GOD presupposed, as the source and life of law and governance. The Constitution of the United States of America does not, for like decorous reasons, in express terms within itself proclaim the existence of GOD; nor does it set forth a legislative profession of faith that the sacred truths of revealed religion are inspired and of GOD'S WORD. But its entire context, and "the laws in *pursuance thereof*," like the form of that more ancient Saxon government upon which ours was mould-

[1] See the *Introduction*, especially p. xvii., by Dean Church, of St. Paul's Cathedral, London, to the *Ecclesiastical Polity* (Clarendon Press Series).

ed, declare, with approved wisdom and decorum by necessary *pre*supposition and inference, that the tenets of the Christian religion lie at the foundations of the government, and are to protect and regulate its operations.

The American system of government, in its respect and care for religion, is more in accord with the grand principle which "gives to GOD the things which belong to GOD" than that of England has been since nearly the time of the Conquest. Regal and, in our time especially, parliamentary discipline has sorely tried the patience, if not the allegiance, of The Church and of Christian communities. Those statesmen who established our form of Constitution knew, and were not unmindful of, the warnings of history. Wherefore it is that Congress is prohibited by the Constitution[1] from making

[1] *Amendments to the Constitution of the United States*, Art I.

any "laws respecting an establishment of religion." When the Constitution thus guarded our religion as a thing which belongs not "to Cæsar," it, with rare force of asseveration, acknowledges that which it places beyond the consequences of human legislation. Let us pause for a moment to reflect, and gratefully, that they have placed beyond the meddling disposition of men, met for secular legislation, that Church which has proved to be the life and grace of all modern government; and, particularly, that we are thereby spared the incoherent strife begot by a parliament and by law courts disciplining the priesthood, as in the England of to-day. There is a class of erratic-minded religionists in our country, whose mere feeling, or, what they misconceive to be conscience, disquiets them, often to the extent of making them refuse to accept public trusts in the national and state services, or to sit even as jurors;

and this because the Constitution, in their fancy, omits to establish, as by human positive law, that GOD exists; and, which would then ultimately and inevitably come to pass, take the Church of CHRIST, as was done by Roman-imperial and by Norman policy, under the oppressive and malign patronage of the civil service.

It is for this cause that I have chosen to speak to you, the DEAN, the FACULTY, and STUDENTS of the GENERAL THEOLOGICAL SEMINARY OF THE UNITED STATES, concerning the unity — the absolute and simple unity, not relative indebtednesses — of the Christian ecclesiastical polity with the principles and administration of our constitutional government and of the common law of the land. It is important that we all, as American citizens, should have correct and definite conceptions on this subject.

In endeavoring to attain this desirable end we must have an adequate knowledge

of the chief source, or rather — as, indeed, is the historic fact — of the duality of primary and consociate powers which once constituted and still find expression in "the manner of the kingdom" [1] of Great Britain; and, therefore, are manifest in that, which is its express image, — the Constitution of the United States. Those dual and consociate forces were, in progression of time: 1st. The ancient principles of the early Saxon Commonwealth, and its inherent disposition to federative government.[2] 2d. The ameliorating influences of the ancient Irish Church in Eng-

[1] "'Samuel told the people the manner of the kingdom, and wrote it in a book, and laid it up before the Lord,' 1 Sam. x. 25. 'T is plain the *manner* of the kingdom signifies the Constitution of the Government." — Somers's *Judgment of Whole Kingdoms*, etc., p. 33.

[2] Turner's *Hist. of the Anglo-Saxons*, 3 vols.; Palgrave's *Rise and Progress of the English Commonwealth*, and his *History of the Anglo-Saxons;* Reeves's *History of the Common Law*, vol. i., chap. 1; Pauli's *Life of Alfred the Great*, trans. by Thorpe; Forsyth's *History of Trial by Jury;* and Freeman's *Norman Conquest*, 1st vol.

land during the rise and settlement of that early Saxon Commonwealth.[1]

The position of the Irish Church in Saxon civilization in England, and the labors of its scholar-monks in continental Europe, must be learned by him who would intelligently esteem the history of Anglican institutions in England. It is a wide theme, and an erudite theme. It is receiving to-day laborious attention from eminent scholars in England and in Germany. It is a subject essential to the complete elucidation of our general theme. But we must abridge our range of thought now to a few

[1] Montalembert's *Monks of the West*, 3d and 4th vols.; and Turner's *Hist. of Anglo-Saxons*, vol. i., b. 3, chaps. 8, 9. Green's *Making of England*, published since the above monograph was written, contains a vivid and interesting account of the missions of the scholar-monks of Ireland among the Saxons in England, and of their influence upon that civilization. Latin Christianity was limited and stopped in its progress till the Synod of Whitby in the year 664; at which time the Irish scholar-monks had already brought the rulers and people of England determinately within the pale of Christianity.

of its circumstances, — important among which are these: That the Church planted in Kent by Augustine, in the year 598, was soon after checked and confined in its career; that much which it had gained was lost, and that it did not begin again to advance till long after the death of Augustine, and not till the result of the Synod of Whitby, in 664, opening the countries of the Anglo-Saxon to the more practically organized missions of Latin Christianity, gave cause and occasion at that Synod to the pure and noble scholar-monks of Ireland to go from the Saxon dominions, and accomplish their glorious careers upon the continent of Europe. The British Church had little, and ceased before the time that Augustine went to Canterbury to have any, effect upon the Saxons; and, after the worse than fruitless attempted conference between Augustine himself and its delegates, in 601, that church drew back, and forever after dwelt among its own peo-

ple in Cornwall, Devonshire, and Wales. Then came the Danes, who, entering England, stood as a solid wedge between the Latin churches and the several people of the Saxon kingdoms. This it was which had left the field there for missionary work open to but one side, and that was the side accessible from the western shores to the Irish Church. After saying thus much, I can more intelligibly continue my theme, historically, showing the vitality of Scandinavian institutions, how they withstood an imperial alien civilization which other institutions in other countries could not withstand; how, borne safely through ages of adversity in England, those free institutions were reëstablished in 1688, exempt from mutability and decay; and find in our American system of government an expression more in sympathy with the originals from which each proceed.

Within a space of sixty years, two commanding events, sufficiently connected

with each other in time and political affinity to constitute one epoch, began to affect the course of English polity.

The conquest of England, as it is called, by the Normans, extended through the years 1068–1071. In that brief space the Church planted by Augustine was by the Conqueror reorganized, or, according to the fact, reduced to the service of the state: following the spirit of imperial domination when the Romans were under the Empire. This was one event.

The discovery at Amalfi, whether real or merely pretended, in the year 1130, of a perfect copy of Justinian's Pandects, served to bring the civil or Roman jurisprudence into new favor over the west of Europe. This body of law had long been quite laid aside, and, perhaps, forgotten. Its study was introduced with great zeal at once into universities on the continent, notably that of Bologna. The clergy of continental Europe took the method and

many of the maxims of their canon law from this august code. Nations just beginning to gather strength anew, after the exhaustion and prostration which followed the disruption of the Roman Empire, adopted the civil law, as the best written plan known to them, for the bases of their respective institutions of government; and some, as with the Normans, associated it with and interwove it into their own feudal customs. It was not long before the foreign fashion reached England. The Church of England had from the time of Alfred its own canon law; but that was produced directly from the Holy Scriptures, tradition, and the councils of The Church, not from profane legislation. Theobald, a Norman abbot, elected to the see of Canterbury, was a benevolent zealot in the revived study. He brought into England with him, as part of his retinue, learned proficients, and among them was Roger, surnamed Vicarius, whom he sta-

tioned in the University of Oxford. This is the second event.

It is natural, when viewed within the social and political surroundings which followed its course, that the Roman law was, and is to this day in England and the United States of America, only a most interesting and superb exotic.[1]

The people of England, at the time when the Roman law was introduced at Oxford, had already, during the preceding seventy years passed under the Norman rule, felt severely the impairing effects of many Norman innovations. England had then, what continental Europe at that era had not, a mild, rational, equitable, and purely national body of law; long in use and established. The people adhered with an intelligent patriotism to their tried institutions. The Norman was laboring in vain

1 Blackstone's *Commentaries*, vol. i., b. 2, chap. i., "On Study of the Law;" Freeman's *History of Norman Conquest*, vol. i., p. 17.

to impose upon them a plan for governing by a feudal system — a government of military tenures. England was then an agricultural nation, and its institutions were free, and strictly in sympathy with such a people. England has, in this century, been made preëminently a nation of manufacturers and traders. The common law of England came from the Sacred Scriptures chiefly, which preach freedom and liberation to all nations. Trial by jury, — of Scandinavian origin, in the form in which it exists in England; the privilege of the writ of habeas corpus; the village community; international law, the offspring of liberal commerce and practical Christianity, were not only unknown, but alien, to the temper of Roman governance. Therefore, the Norman domination, in its long course of tyranny, never was able to reach so far as to touch the sure foundations of the Saxon Constitution. The restoration of The Church, commonly

called the Reformation, finally recovered, and secured exemption, from a dictation and supervision which the policy of the Conqueror inaugurated. Nothing new was acquired, old things were regained.[1] The

[1] The Paddock Lectures for 1881, by the Right Reverend the Bishop of Connecticut, Dr. Williams, *Studies on the English Reformation*, are an admirable general exposition, conceived in a most just and conciliatory spirit, and likely to satisfy all pertinent and intelligent questions concerning that momentous epoch.

From Hallam's *View of the State of Europe during the Middle Ages*, vol. ii., pp. 323, 324, I quote the following reflections, to show that that which we call "progress" is in historical truth a recurrence to those primary principles from which nations have wandered, or have been driven by usurpation. There is not an important moral or political reformation related in history but has been equally the assertion and reëstablishment of an ancient well-ordered freedom, and a manifestation of a living power. "One is surprised," says Hallam, "at the forbearance displayed by the barons, till they took up arms at length in that confederacy which ended in establishing the great charter of liberties. As this was the first effort towards a legal government, so it is beyond comparison the most important event in our history, except that revolution, without which its benefits would have been rapidly anni-

revolution of 1688 simply resettled, and thereby established, likewise, the principles of the ancient Saxon governance of Alfred and of Edward the Confessor.

From the moment that the Norman thus attempted to superinduce a foreign civiliza-

hilated. . . . All that has since been obtained is little more than as confirmation or commentary; and if every subsequent law were to be swept away, there would still remain the bold features that distinguish a free from a despotic monarchy. . . . An equal distribution of civil rights to all classes of freemen forms the peculiar beauty of the charter. In this just solicitude for the people, and in the moderation which infringed upon no essential prerogative of the monarchy, we may perceive a liberality and patriotism very unlike the selfishness which is sometimes rashly imputed to those ancient barons. And, as far as we are guided by historical testimony, two great men, the pillars of our church and state, may be considered as entitled beyond the rest to the glory of this monument: Stephen Langton, Archbishop of Canterbury, and William, Earl of Pembroke. To their temperate zeal for a legal government, England was indebted during that critical period for the two greatest blessings that patriotic statesmen could confer: the establishment of civil iberty upon an immovable basis, and the preservation of national independence."

tion upon that Scandinavian civilization; from the moment that the same force attempted to organize The Church in the temporal interests of despotism; from the moment that the common law was to be suborned to an intrusive jurisprudence, two great parties arose. The history of those parties relates the moral, intellectual, and political history of England. Recite the names of the leaders of those parties during the last eight centuries, and you recall, on one side, every name that is detested, and, on the other side, every name that is venerated in English history.

By what opposing forces was this moral, intellectual, and political struggle, which began in 1070, waged? On the one side was the tyranny of military and personal government, with an organism of law and religion as its handmaid. In opposition, was the spirit of orderly liberty: embodied in the indestructible ancient constitution, the principles of the common law of the

land, and The Church. Many, like Lanfranc and Anselm, came kindly by the "courage of opinions" which springs from "a free church in a free state;" they brought with them that courage from their native Italy; from the propagative genius of communities of religious learning, where the intrepid charity of the Monks of the West, scholars and soldiers of the Cross, had planted houses of refuge and church-centres of erudition and pious devotion, on the plains of Lombardy;[1] by the shores of

[1] The famous Abbey of Bobbio, for example. It was founded in 612 by S. Columban, the great rival of the Benedictines, and the associate missionary on the Rhine and in Switzerland, of S. Gall (Milman's *History of Latin Christianity*, ii., pp. 237-247). He was born in Leinster, Ireland, in 543. The library and school of that foundation were the most celebrated of the Middle Ages; there he "lighted the flame of science and learning, which for a long time made it the torch of Northern Italy" (Montalembert, *Monks*, iii., etc). He there died November 21, 615. The place is desolate, neglected, and not easy to reach; but the tomb of S. Columban, in the ruins of the Abbey, has been visited, even in this utilitarian day, by the churchman-tourist from America.

Constance and Zurich;[1] in the valley of the Nahe;[2] on the banks of the upper Rhine.[3] The sway of The Church in pro-

[1] The Benedictine Abbey, founded about 606, by S. Gall, an Irish monk, and in the eighth and ninth centuries one of the most important scientific seminaries in Europe. The library is very rich in rare and valuable MSS., of which there exists a catalogue, dating from the year 823. Its treasures are still sought by the literary antiquarian. Among them is one of the three known copies of the Gospels, by MacDurnan, the Irish monk and caligrapher (seventh century). Trinity College, Dublin, has a copy. The third, esteemed the chief literary-treasure of the Lambeth Palace Library, London, is a specimen "of that rare and peculiar Hiberno-Saxon art," of which S. W. Kershaw, M. A., the librarian, has recently published a history, with fac-similes of some of its illuminated pages. See, as to the Irish MSS. on the continent, Montalembert, *Monks*, vol. i., pp. 121, 122, and notes.

[2] The monastery on the heights of Disibodenberg, founded (eighth century) by the Irish bishop Disibodus, who died A. D. 750; he was the first propagator of Christianity in this district. The ruins still testify to the extent and grandeur of the buildings, and are among the most significant which I have seen in the vicinity of the Rhine. The establishment was abandoned in 1559.

[3] S. Suibertus, a native of Ireland, first preached the

tection of civil liberty was most masterly and efficacious. Most truly did Sir Fran-

Gospel in this vicinage in 710. In the old Romanesque church, in the royal town of Kaiserswerth, is a beautiful reliquary ( thirteenth century ), in which are the bones of that scholar and priest ; and near by, at Elberfeld, is a fine public monument in the *Hardt*, in grateful commemoration of the labors of Suibertus. In the ancient Church of the Minorites, "the poorest of the poor," at Cologne, rest the remains of Dun Scotus, surnamed Erigena, "the Irishman." The great "Subtle Doctor," died there, an active member of the Society of the Minorites, but retired from mere worldly affairs. The tomb is behind the great altar, and is a florid and tasteless new work, glaring in gilt and divers colors, and inscribed, "Ioannes Scotus : Sacræ Theologiæ : Doctor Subtilis : Ord. F. F. Minor. : Obiit Anno 1308." People saw there, in former years, the humble slab which once marked the grave of the exiled scholar, bearing upon it the legend composed by himself : "*Scotia me genuit, Anglia me suscepit, Gallia me docuit, Colonia me tenet.*" The present work of "restoration" on this remarkable and venerable archaic structure has done much to obliterate what was once attractive and appropriate.

I have been thus careful in adding these circumstances of the death and place of burial of Dun Scotus, because I notice that even authoritative writers, like Montalembert, Hallam and Milman, who have written con-

cis Palgrave declare that "to the successors of the Anglo-Saxon prelates (and let me add on his, and the greater authorities which I have named, the Irish Church), we mainly owe," he says, "the preservation of the forms and spirit of a free gov-

cerning him, are in doubt or entire ignorance as to, or do not mention, those facts. The story, as sometimes related, of his death is taken by Matthew of Westminster from that of a later "John the Saxon." I have not been tempted to place this and the three preceding notes in connection with the text from motives of display, either personal or national, but to gratify a desire that these things may be known better and wider than they are known; and may be acknowledged and admired. The occasion is not unsuitable. We may well pity, with Samuel Johnson, that piety which could coldly contemplate the scenes of such almost apostolic labors, and not warm to enthusiasm under their inspiring influences: —

"Where once came monk and nun with gentle stir
Blessings to give, news ask, or suit prefer . . .
Think, proud philosopher!
Fallen though they be, this glory of the West,
Still on her sons the beams of mercy shine;
And hopes, perhaps, more heavenly bright than thine,
A grace by thee unsought, and unpossest,
A Faith more fixed, a rapture more divine,
Shall gild their passage to eternal rest."

WORDSWORTH.

erment, defended not by force *but by law;* and the altar may be considered as the corner-stone of the ancient constitution of the realm." [1] Indeed, when William the Conqueror took compulsorily the oath that he would maintain the ancient institutions of the Saxon polity, and that the laws should continue to be published, and law proceedings continue to be held, in the English language, Lanfranc, Bishop of Canterbury, in the name of The Church, and on behalf of the People of England, stood witness to the pledge.

These constituted the opposing and irreconcilable forces. Irreconcilable, indeed! You may accommodate — it is commendable — and be "all things to all men;" but principles can never be compromised. History attests the severity of this truth. The ruffian reign of the Norman; the subtle and contentious dominion of the Plantagenets; the more subtle and not

[1] Palgrave's *History of the Anglo-Saxons*, p. 70.

less cruel government of the Tudors; the crafty dynasty of the Stuarts, could not submerge the buoyant energy of a simple and constant-minded race of men.

Whence came that energy? Much, to be sure, is inherent in the race itself. But without such ancient institutions and definite laws, as those which ennobled that people, the battle would have been to the strong. Those institutions were founded on an obedience to divine law, and order abided with them even in the midst of revolution. It was by the peaceful revolution of 1688, when the representatives of all England, in congress assembled, called the nation as it were to order, and proceeded in due form of law and according to precedent, that the liberties and peace of Great Britain were rescued and made sure. That was not rebellion, it was not treason;[1] it was not what is called prog-

[1] "That cause is just which defends the laws, which protects the common good, which preserves the state;

ress. It was retroaction. It was, in a word, revolution: by which that which had been was brought legitimately around again.

I have dwelt on the principle of the Revolution and Settlement of 1688, because it was the prototype and immediate authority for the American Revolution; and I have spoken, as introductory to that era, of the development of the early Saxon institutions, because they are the foundations of our own Constitution.

It was an intelligent and graceful thought which led the founders of the American Republic to name our first national vessel Alfred, after the founder of the Saxon Commonwealth.[1] For he had

and that cause is unjust which violates the laws, defends the breakers of the laws, protects the subverters of the Constitution. They neither are, nor can be, traitors who endeavor to preserve and maintain the Constitution." — Somers, *Judgment of Whole Kingdoms*, etc., pp. 9, 28.

[1] November 25, 1775.

organized his nation upon the precepts and mandates of Holy Writ. Our own government and the laws which administer it, like those of Alfred the Great, are, in every part, — legislative, judicial, and executive, — Christian in nature, form, and purpose. In using the term Christian, I do not and cannot use it in an excluding sense. Alfred, in collating the laws of England, certainly considered the Jewish law as part essentially of a Christian system of secular government and as the authority and foundation of the common law. Let me repeat, therefore, that I use the word compendiously and in this inclusive import.

Continue your attention, while I now follow the historical traces which lead us to the conclusion that Christianity is of our civil polity. I esteem it a special privilege to defend the form of government under which we live from the imputation that it is a government which declines or avoids

an acknowledgment of Almighty God, a merciful Providence, and revealed religion. How such a marvelously absurd conceit first arose I have not been able, nor am I disposed, to search out. It first got a notorious currency from a letter written by Thomas Jefferson, in 1811, to a Major Cartwright. It was then and has since often been construed, but erroneously, to contain an insidious argument to prove that Christianity is not a part of the common law. The reputation of Thomas Jefferson has to sustain many things which the minds of careful men are not willing to accept for sound doctrine, and many things are imputed to his name of which he was not intentionally the author nor the propagator. I think fair dealing requires that he should not be held answerable for, in his letter to Major Cartwright,[1] uttering such a thought. I do not mean to say that had occasion then, or at any

[1] Jefferson's *Correspondence*, vol. vii., pp. 355–361.

other time, seemed to him to call for the assertion he might not have asserted that fallacious assumption. But sufficient to the occasion is the evil thereof. He certainly then did not. A public controversy, nevertheless, arose. Great names appeared in the arena of debate, and a most erudite and irrelevant discussion was added to the literary tumults of that day. What Mr. Jefferson wrote was: that a decided case, reported in the Year-Book of the 34th Henry VI., pp. 38–40, had not adjudicated that Christianity was of the common law. So that the issue joined for the discussion was: whether a secular tribunal had, in that case, judicially recognized Christianity as part of the general law which an English court was required to administer. The war of words bore no relation to the solution of the question. If Christianity be part of that law, surely it exists as such independently of all human tribunals. The office and duty of the judge is simply to

*declare* that which is law,[1] and unless the maxim of which we speak can be ascertained and established, by evidence, as coming from an authority above and greater than the delegated power of a human tribunal, the maxim stands on very new-made and infirm ground.

These words are a literal translation of Mr. Justice Prisot's judgment in the case: "As to those laws," he says, "which those of Holy Church have in ancient scripture, it behooves us to give them credence, for this is Common Law." Mr. Jefferson inferred that those words "ancient scripture" mean *ancient writings*, and not the Holy Scriptures or Bible. For all that his contention is worth, with regard to its value on the main point, it may as well be

[1] The derivation repeated by Skeat in his masterly *Etymological Dictionary of the English Language*, just published, is most significant of the judicial function: "The stem *iu-dic* = *ius-dic*, meaning 'one who points out what is law;' from *ius*, law, and *dic-are*, to point out, make known."

conceded that Mr. Jefferson is correct; it is not worth the argument whether it is he or his assailants who are correct. For, of what was the judge speaking? He himself explains that he is speaking of the principles of that primal and eternal justice upon which "all manner of laws are founded." He alludes clearly to some understood, fundamental doctrine in concert with the institutions of the country; some supreme law, having a foundation in nature [1] and by Divine appointment, not merely a positive ancient code of The Church. It is plain that, in this use of the words "ancient scripture," Mr. Justice Prisot meant simply the ancient writings or legal institutions of England; and then, in that relation, he acknowledges the natural and revealed law, which, being the will of God, is that "upon which all manner of laws are founded." Thus inter-

[1] "All laws are founded in nature, and not in opinion." — *Cicero.*

preted, the famous case in the Year-Book testifies to the Christian character of the constitution and laws of England; from which, I again aver, we derive our own American legal institutions. At some future time I may write concerning the unity of those municipal laws particularly with the mandates of Holy Scriptures. Now I speak chiefly of the nature and form of our government itself.

All that is excellent in human nature is the product of an excelling quality which has led the way. There were heroes before Agamemnon, and there were principles before heroes. There was an Alfred, surnamed the Wise,[1] before there was an Alfred, surnamed the Great. Centuries before Alfred the Great gave a more perfect form and procedure to the governance and

[1] A. D. 684–728. Turner's *History of Anglo-Saxons*, vol. i., pp. 332–336. Alfred the Great was born A. D. 849; died 901. He fashioned his character and public career upon the ideal of his royal predecessor, Alfred the Wise, of Northumbria.

laws of his Commonwealth, that government and those laws were known to and cherished as a birthright by the people of England; they had then long been respected, and had been, by a line of Saxon law-givers, embodied from time to time in an administration suitable to the traditions and habits of the race.

I do not purpose even to outline the history of the rise of that Commonwealth. I draw attention to the chief tributaries which filled and shaped its course as a government of power and equity, — of "folk-right," as Edward the Confessor called it. They are the parent sources of our nationality; we, by political descent, are their children; and, "if children, then heirs" of this elder race, from which Great Britain herself inherited her original stock of good doctrines and institutions. When Alexander Hamilton said that the Constitution of England was the best "model to work from," he thought for the colonists — who

had, as Montesquieu observed, "grown great nations in the forest they were sent to inhabit," — in like mind with Alfred, who only adjusted the administration of public affairs to the temper which an ancient people brought with them from their immediate fatherland, and in the atmosphere of which the Angles in Britain had "grown to be a nation." While the Saxon Commonwealth was in progress of accretion and consolidation, the Roman power had departed, the dominion of the Briton had passed away from that part of the country, and the Anglo-Saxon occupation, from the Pictish sea to the Channel, was complete in 638. Latin Christianity, checked in its mission among the Saxons, as I have already stated, rested awhile from its labors. The scholar-monks of Ireland, invited by and associated with the Saxon kings, "occupied the entire field." [1]

[1] Green's *Making of England*, pp. 269–313: King "Oswald obtained a bishop from Icolm-kill to instruct his

There was not, however, yet an England. The work of God's providence had

rude subjects;" and "had the satisfaction of perceiving the blessings of Christianity diffused into Wessex." Turner's *History*, etc., vol. i., pp. 316, 317. And see Bede, lib. iii., c. 21, as to Diurna: "Christianity spread through Mercia with great celerity. Its two first bishops were Irishmen; and the third, though born an Angle, was educated in Ireland." Turner's *History*, ibid., p. 323. "It was not the Church of Paulinus which moved Oswald to this struggle for the Cross. Paulinus had fled from Northumbria at Eadwine's fall; and the Roman Church in Kent shrank into inactivity before the heathen reaction. Its place in the conversion of England was taken by missionaries from Ireland. . . . Ireland, which remained unscourged by invaders, drew from its conversion an energy such as it has never known since. Christianity had been received there with a burst of popular enthusiasm, and letters and arts sprung up rapidly in its train. The science and Biblical knowledge which fled from the Continent took refuge in the famous schools which made Durrow and Armagh the universities of the West. The new Christian life soon beat too strongly to brook confinement within the bounds of Ireland itself. Patrick, the first missionary of the island, had not been half a century dead when Irish Christianity flung itself with a fiery zeal into battle with the mass of heathenism which was rolling in upon the Christian world. . . . For

still to be done. The means to do it were ready at hand. The Saxons in Britain were at last to be subdued to a Christianized civilization. Though the British Church was hostile to the Saxon, who

a time, it seemed as if the course of the world's history was to be changed, as if the older Celtic race that Roman and German had swept before them, had turned to the moral conquest of their conquerors; as if Celtic and not Latin Christianity was to mould the destinies of the churches of the West. . . . Thence, from the monastery which gave to the spot its after-name of Holy Island, preachers poured forth over the heathen realms. . . . Aidan himself wandered on foot, with the king as his interpreter, preaching among the peasants of Yorkshire and Northumbria. . . . The labor of Aidan, the victories of Oswald and Oswi, seemed to have annexed England to the Irish Church. The monks of Lindisfarne, or of the new religious houses whose foundation followed that of Lindisfarne, looked for their ecclesiastical tradition, not to Rome but to Ireland; and quoted for their guidance the instructions not of Gregory but Columba." Green's *History of the English People*, vol. i., pp. 21, 22, 28. And see Montalembert's *Works*, etc., vol. ii., pp. 1–131; and Green's *Making of England*, pp. 213–230, 269–313. And as to the mission of Aidan, see Milman's *History of Latin Christianity*, vol. ii., pp. 190–192.

had driven its people from their native soil to "the strangers' land,"[1] and though that Church had repelled irreconcilably the demands of Latin Christianity for supreme ecclesiastical jurisdiction;[2] though Latin Christianity had made little way to the Saxon heart, and was finally hemmed in by the Danish irruptions, the future England was not stayed. It saw and sought the influences of educational and

[1] Nations often have two or more designations: those used by foreigners, and that more properly used by themselves. So it comes that the "Cymri" are called Britons. This name was given to them by the Romans, and derived from "Prydain," or Britain, the country in which they were found. But in our common Saxon tongue we call them Welshmen, a descriptive term formed from the old English or Saxon Wilisc, an adjective, signifying that which is foreign or strange. For example, Italy is the Welschland of the modern Germans, and their Welschers are the Italians, foreigners to them, as were the Cymric-Britons to the Jutes, Angles, and Saxons.

[2] Green's *Making of England*, p. 221; Montalembert's *Monks*, etc., vol. ii., pp. 178, 179.

spiritual life, and thereby national development and greatness, from that copious fountain, destined to water and make fruitful many other "thirsty soils," — the Irish Church. The relations between the Saxons and the Irish were during this epoch, the sixth and seventh centuries, and indeed in centuries later, cordial,[1] were fostered by mutual friendly intercourse, and by special benefits conferred upon the Saxons. Many actual circumstances elicited fervent sympathy and conduced to beneficent coöperation between the pious and learned men of that communion, and the tribes which were to be the founders of the English nation.[2]

[1] Bede, lib. iv., chap. 26: Malmsbury, p. 20, quoted in Turner's *History*, etc., vol. i., b. 3, chap. 8, and note 49.

[2] "It was at this period that Ireland appears to have been conspicuous for the literature of some of her monastic seminaries. Bede states, that many of the noble and middle classes of the English left their country and went to Ireland, either to study the Scriptures, or to pass

The Angles, guided by the learning, piety, and wisdom of these, their spiritual allies, caused their own language,[1] their literature, their own customs and laws, to be paramount throughout Britain, and Britain became the Angles-land. The

a more virtuous life. Some connected themselves with the monasteries, and preferred passing from the abode of one master to that of another, applying themselves to reading." "The body of King Ecgfrid was taken to Icolmkill, and buried there." Alfred of Northumbria, surnamed the Wise, the prototype of Alfred the Great, "devoted himself to piety and literature, and voluntarily (before he succeeded to the throne) retired into Ireland, that he might pursue his unambitious studies." "Learned monks from Ireland had given to his father and country what intellectual information they had acquired." Turner's *History of the Anglo-Saxons*, vol. i., b. 3, chaps. 8, 9.

[1] "The English language is simply Low Dutch, with a very small Welsh, and a very large Romance infusion into its vocabulary. The English language retained its purely Low-Dutch character down to that great infusion of Romance words into our vocabulary which was a result, though not an immediate result, of the Norman Conquest." — Freeman's *History of the Norman Conquest*, vol. i., pp. 14, 17.

Irish monk had done his task in England.

Alfred the Great, when the times served to cultivate the arts of peace, acted the part of the true reformer. He avoided innovation, he restored, strengthened, and improved that which existed; and the elements of the system of constitutional government which he erected, including the pre-supposition of Divine authority therefor, are those upon which our governmental structure rests. Wherefore it is needful that we understand the Constitution and laws of his Saxon Commonwealth, so that we may clearly comprehend and esteem our own.

Alfred the Great apparently concerned himself in four things chiefly: (1.) Plans for the moral and intellectual culture of his countrymen; and to gain that object the diffusion of knowledge throughout the people. The usual tendency of the Middle Ages was to centralize learning, and

keep it within a designated caste, dissociate from the other social orders. Alfred's policy, contrariwise, and in association with that of the scholar-monks of Ireland, was to counteract this tendency, create a national habit of thought by the use of the native tongue[1] in all literature; and direct education, so as to enable every individual to obtain a share, according to his station and degree, in the common inheritance of knowledge and wisdom. A circular letter, issued by Alfred to the bishops in England, expresses the earnestness of intention, the comprehensiveness, precision, and patriotism of his mind. He recommends the translation — these are his words — of "useful books into the language which we all understand, so that all the youth of England . . . may be grounded in letters, for they cannot profit in

[1] "Aidan and his brethren, now familiar with the Saxon speech, preached the Gospel in every part of the kingdom." — Milman's *Hist. Latin Christianity*, ii., 191.

any pursuit until they are well able to read English." Already, before Alfred's time, some knowledge of the Bible was, through the English Caedmonian version, familiar to the people. The venerable Bede, also, had rendered the Gospel according to St. John, and also other portions of Holy Scriptures, into the common speech. There were, besides, the Anglo-Saxon versions of The Psalter; and the second book which Alfred, in the course of his theological studies, read, was a selection from The Psalms, "with the daily prayers according to the usage of the *ancient* Church." It is an evidence of the success with which the scholar-monks of the Irish Church had diffused Saxon literature upon the Continent, that Alfred was taught his love for his native tongue and its literature by a Frenchwoman, his step-mother Judith, the granddaughter of Charlemagne.[1]

[1] Turner's *Hist. Anglo-Saxons*, vol. i., pp. 432, 433. and Montalembert's *Monks of the West*, vol. ii.

(2.) Alfred thought it a primary duty for the Christian sovereign to institute good laws and necessary rules of practice for their administration. Some of his predecessors had done much, and few more than he whose auspicious name he bore, Alfred the Wise, of Northumbria. The Code, as it is called, of Alfred the Great differs in no fundamental doctrine or rule from the jurisprudence of his predecessors in the royal office. Ethelbert had reduced the traditionary legal customs of the Kentish Jutes to writing. Ina, King of West-Saxons ; Offa, of Mercia, and other Saxon monarchs, had from time to time published their "Dooms," or judgments. It was from these statutes — many of them taken directly from the Bible — Alfred selected those articles and chapters which he thought most authentic and suitable ; some he amended, few were rejected. The greater part of the laws from which he made his compilation are

still in existence; and the alterations made by insertion, alteration, and omission do not, when taken together, afford any characteristics peculiar to Alfred's work.[1] He made no substantial alteration whatever in the laws and usages of his realm. He introduced, he encouraged, no new doctrine. He himself tells how it was that he would not venture upon it. He was fearful that by such precedent new laws enacted by him might, in their turn, be rejected by posterity, as not warranted by the ancient authority and genuine "law of the land." That there were defects in the Saxon law none knew bet-

[1] Sir Roger Owen's work (MSS., Harleian Collection, British Museum) on *The Antiquity and Excellency of the Common Laws of England*, quoted in Whitelock's *Commentary on the Parliamentary Writ*, vol. i., p. 208; Wilkins' *Leges Anglo-Saxonicæ*, pp. 28–46; Barrington's *Observations on the more Ancient Statutes*, p. 116; Thorpe's "*Ancient Laws and Institutes of the Anglo-Saxons;*" and Stubbs' "*Documents Illustrative of English History*," pp. 59–74.

ter; but he judged (we have his own word to this effect [1]) that it was sound policy to permit a defective law to remain than to weaken the foundation upon which all law depends, *respect for Established Authority.*

This was the secret strength of our Revolution of 1776; "a constitutional war," as Lord Shelburne has admitted it to be.[2]

[1] "I then, Alfred, King, these [laws] together gathered and had many of them written which our foregangers held, these that we liked, and many of them that we not liked I threw aside, with my Wise Men's thought, and on other wise bade to hold them. For why I durst not risk of my own much in writ to set, for why it to me unknown was what of them would like those that after us were. But that which I met, either in Ine's days my kinsman, or in Offa's the King of the Mercians, or in Æthelberhts that erst of English kin baptism underwent, those that to me righted seemed, those have I herein gathered and the others passed by. I then, Alfred, King of the West-Saxons, to all my wise men these showed, and they then quoth that to them seemed good all to hold."— Alfred's *Dooms*, Thorpe's *Laws and Institutes*, vol. i., pp. 58, 59; Freeman, *Hist. Norman Conquest*, vol. i., pp. 53, 64.

[2] "The Romans had a war of a character similar to that

In these characteristics of the founder of the Saxon Commonwealth we see that *veneration for precedent* which controls the English mind to this day. A reverence for the past has proved in crises of civil strife and revolution the sheet-anchor of England's safety.

(3.) Village communities are an important social and political institution. Their existence in Alfred's municipal system indicates the far more distant origin of the idea upon which he regulated the political position of the people towards the State. We trace this particular institution to the earliest ancestors of the Anglo-Saxons; we see it this day in the more ancient and still living village communities of India; and it is remarkable, and of special value

being carried on in America. They did not call their enemies rebels; the war itself they called the Social War; and in the same sense he desired to call the war in America a *Constitutional War*." — Fitzmaurice's *Life of Shelburne*, vol. ii., p. 304.

in our own political history, "that," as Sir Henry Sumner Maine informs us, "the earliest English emigrants to North America, who belonged principally to the class of yeomanry, organized themselves in village communities for purposes of cultivation."[1] The powerful part which our New England towns and town-meetings took in the Revolutionary era, from 1763 to say 1777, shows their political utility.

Lastly: Alfred's guiding object "crowning all," subordinating every member of the body of government to this function, was to inflame temporal legislation and administration with the spirit of the law of God.[2] *In doing this Alfred did not by*

[1] Maine's *Village Communities*, p. 201.

[2] Two instances remarkably exemplify this purpose: —

1. This case arose in Coke's time: A. on a trial at law, swore wilfully, absolutely, and falsely against B. in a capital charge. B. was, in consequence, convicted and put to death. Question: Was the false witness guilty of murder? 3 Coke's *Institutes*, 48. The crime was punishable by death according to the Divine, or Mosaic law,

*needless human enactment vainly strain to assert what all religiously acknowledged:*

and by the common law of many civilized nations; but not by modern English law as adjudicated. 4 Blackstone's *Com.*, 138, 139. By the ancient law of England it was punished by death, but, as Coke says, "no instance of conviction allowed since." It was under the mandate of this Divine law that Alfred proceeded in the cases of the "unjust judges," for, in violation of their official oaths, illegally having prisoners put to death. Alfred "hanged Markes, because he adjudged During to death by twelve men not sworn. He hanged Freberne, because he adjudged Harpin to death when the jurors were in doubt about their verdict: for when in doubt we ought rather to save than condemn." *Mirroir des Justices*, pp. 296–298.

During his reign, and the after Saxon dominion to the time of Edward the Confessor, the usage was universal throughout the realm of accompanying the names of those who signed, whether as parties or witnesses, written instruments with "holy crosses." Then by the learned, also; but the habit continues to our day, even in this country, when the parties are illiterate, perhaps with few knowing of its pious origin and significance. The introduction of the wax-seal was by Edward the Confessor, who learned of that and other Norman customs at the court of his cousin William in Normandy.

THE EXISTENCE AND OMNIPOTENCE OF GOD, AND HIS PRESENCE IN HUMAN AFFAIRS. He reverently and simply prefaced his Collection of Laws by the Divine Law; and, for the first time, preceded formally Anglo-Saxon legislation by the Decalogue, the principal provisions of the Mosaic law contained in the three chapters which follow the Decalogue, with some necessary formal modifications, and the canons of the Apostolic Council.[1] These sacred writings were not meant to constitute legislated parts of the human law, but, as in order of authority so in order of arrangement, their precedence declared them the authority, the foundation, and the fountain of jus-

[1] "It would be difficult to find in any other collection of laws of the Middle Ages so large a portion of Biblical matter as in this; and we know, too, that no other has so completely adopted the principles of the Mosaic law. . . . In no other do we find the idea of blending the old Teutonic law with the Hebrew-Christian, so perfectly carried into effect." — Pauli's *Life of Alfred*, trans. by Thorpe, p. 136, Bohn's edit.

tice and earthly rule. Self-evident, understood, presupposed, it declares that no government other than those which rest therein is legitimate. "Do these," says Alfred, referring to those Divine precepts, "and if these commands be obeyed, no other doom-book will be required." The Code of Alfred lives, and nowhere more potentially than in the political institutions of America. Great nations decline and fall: great men are often detected; but a great book is, indeed, imperishable; and, like the granite accretions of the rock, growing from age to age, indestructible.

These suggestions are sufficient to show that the Constitution and laws of England and of the United States of America came into form and operation under benign influences such as no other nation ever started with, and were cultured in associative influences thoroughly indoctrinated with the genius of Christian civilization and civil liberty.

The colonists in America were more intense and intelligent in their devotion to the principles of Saxon institutions and the Common Law than the people of England, even during the Saxon strife with the early Norman aggressions. The teaching of Lord Somers — he who restored English civil liberty to its ancient and pristine legal security — was, as we have noticed, familiar to our colonial people. Blackstone's Commentaries was among those people as a book of popular literature. "I have been told by an eminent bookseller," said Edmund Burke to the House of Commons in 1775, "that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use." The first great commentary by an Englishman, written in the English language, was this by Blackstone, in vindication of England's ancient Saxon laws and

Constitution: and in protest against the asserted superiority or even equality for English rule of the civil law.

One of the beautiful boasts of our municipal system is: that the Common Law, and therefore the Constitution in pursuance of which that law prevails, comes to us refulgent with the enlightening authority of the Christian religion. "There never has been a period," said Story, in his inaugural address as the Dane Professor in 1829,[1] "in which the common law did not recognize Christianity as lying at its foundations. It repudiates every act done in violation of its duties of perfect obligation. It pronounces illegal every contract offensive to its morals. It recognizes with profound respect its holidays and festivals, and obeys their sacred mandates. It still attaches to persons who believe in its divine authority the highest degree of credibility as witnesses; and,

[1] Story's *Miscellaneous Writings*, pp. 517, 533, 535.

until a comparatively recent time, infidels and pagans were banished from the halls of justice. The error of our government, it has been asserted, is in reality of a different character: it tolerated nothing but Christianity." Story might have added to this enumeration that laws in pursuance of the spirit of our Constitution prohibit, under penalties, the name of God being publicly blasphemously uttered;[1] and will not allow the worship of God to be wantonly and openly reviled to the annoyance of believers and bad example to the public. The sanctity of the LORD'S DAY is acknowledged, and contracts made on that day invalidated.[2] The conscience of each public servant is bound by "that adamantine chain, an oath," to the throne of God:

[1] Judgment of the Supreme Court of the State of New York, delivered by Kent, Chief Justice, in the case of The People *vs.* Ruggles, reported in *Johnson's Rep.*, vol. viii., pp. 290–298. See Appendix A, pp. 67–80.

[2] Appendix B, pp. 80–82.

in the legislative, in the judicial, in the executive departments. From the President of the United States, from the Chief Justice of the United States, from the Senators, down to the humblest officer in the nation:[1] State, municipality, and

[1] Art. 6, sect. 3, of the *Constitution of the United States*. The general rule in England, as in the United States of America in its national administration, is to the same purport. The regulations in other Christian countries are worthy of remark. *Spanish deputies* swear fidelity and obedience to the King with their hands on the Gospels; the member says, "I swear:" and the President answers, "If you do so, may God reward you, and, if not, may He call you to account." The President of the *Italian Chamber of Deputies* invites a new member to be faithful to the King, etc.: the deputy then stretches out his right hand, and pronounces the single word, "Giuro." In the *Kingdom of the Netherlands* all new members of the States-General, of whatever religious professions, with the exception of Anabaptists or Mennonites, have to take this oath: "I swear fidelity to the Constitution, so help me, God Almighty." In *France*, since the fall of the Empire (1872), no oath or affirmation is administered in any form to members of the legislative body of the Republic. Nor is there any form

village. The Constitution expresses, in these visible signs, the substantial idea; it marks the reality of its Christian character; and it finally and affirmatively declares, in express terms, that the enactments which compose the Constitution were "done . . . in the year of OUR LORD, 1787." It was the deliberate issue of re-

which can be esteemed equivalent. Under the Empire merely a declaration was required to this effect: "I swear fidelity to the Emperor and the Constitution." The name of God was not included. The members of the *German Parliament* now take no oath nor make an affirmation. But the omission is said to be caused by a desire to avoid the delicate question as to the amount of loyalty due to the Emperor in contradistinction to that due to state sovereigns. The members of the Prussian and most other state parliaments do take an oath beginning with the words, "I swear by God, the Omnipotent and Omniscient," and ending with, "So may God help me;" and to this formula those who wish may add, "through Jesus Christ, to eternal bliss. Amen!" The declaration in use in the United States, conforming to their religious spirit, begins, "I [A. B.], do solemnly swear [or affirm]," and ends, "So help me, God."

ligious traditions, circumstances, convictions, and acknowledgments.

The original thirteen States inherited and continue in legal succession and amplitude of jurisprudence, the common law;[1] and as to the courts of the national government, their limitations concern subjects of jurisdiction, and not the applicability, within that jurisdiction, of the rules of the common law.[2]

[1] The common law, as it stood on the 19th of April, 1775, was adopted by the Constitution and made part of the law of the States. *Constitution* of 1777, section 35. It is determined by the highest and ultimate judicial power of the nation, Robinson *vs.* Campbell, 3 *Wheaton's Rep.*, 212; 10 *Ibid.*, 159, that the remedies in the federal courts were to be "according to the principles of common law and equity, as distinguished and defined in that country from which we derived our knowledge of those principles." "It is," says Kent, "the common jurisprudence of the United States, and was brought with them as colonists from England, and established here." *Commentaries*, vol. i., p. 543.

[2] Story treats this doctrine in his *Commentaries on the Constitution*, 140, 141.

In conclusion, we can safely add that, when our nation came to formulate and express its peculiar constitution of government, a simple instrument of mere federo-nationality, it was, therefore, neither necessary nor desirable that such an instrument should contain an affirmative and declamatory formula, on behalf of the consociate States, that such a people, coming of such a lineage, believed in God and acknowledged Holy Writ. It would have savored of pretentious cant, and made at best only a parade calculated to offend men of good taste and sincere religious convictions.[1] Our colonial and, thence proceed-

[1] Foster's *Essay on some of the Causes by which Evangelical Religion has been rendered unacceptable to Persons of Cultivated Taste* (see *Essays on Decision of Character*, etc., pp. 177–311).

An instance of inaugurating a Republic ostentatiously, as if under the special auspices of God, was the impious pageant performed in the Champ de Mars, July 14, 1790; in which Talleyrand, then Bishop of Autun, acted, with ill-repressed satire, the conspicuous part of high-priest, or chief mummer.

ing, our United States, already possessed the principles of the ancient Constitution of their forefathers, with all time-honored traditions and self-evident truths, and ever walked in subjection to them. As the Decalogue, the Mosaic precepts, the Apostolic Councils, like the cloud that led and the pillar of fire that enlightened the people of Israel, go before the legal traditions and unwritten governance of Great Britain and Ireland, so, in fact and in historic truth, do their sacred authority go before, illuminate, and guide our own governance and our administration of national affairs. Not less understood, not less manifest, not less reverenced and obeyed, because not formulated by legislation.

# APPENDIX.

## A.

PAGE 60.

THE defendant was indicted in Washington County, State of New York, in December, 1810, for wickedly, maliciously, and blasphemously uttering and with a loud voice publishing, "in the presence and hearing of divers good and Christian people, etc., of and concerning the Christian religion and of and concerning JESUS CHRIST," certain false and blasphemous words; which need not, in this recitation, be repeated, but which the indictment averred to have been uttered by the prisoner "in contempt of the Christian religion, and in contempt of the laws of the State, to the evil and pernicious example of all others," etc.

On the hearing of the appeal by the Supreme Court, the counsel for the prisoner con-

tended that the offense charged in the indictment was not punishable by the law of the State; and that, from the preamble to and the provisions of the Constitution of the State and the silence of the Legislature, it was to be inferred that Christianity did not make a part of the common law of the State. There are no statutes concerning religion, except those relative to the Sabbath and to suppress immorality. The Constitution allows a free toleration to all religions and to all kinds of worship. The exception as to licentiousness refers to conduct, not opinions. Judaism and Mahometanism may be preached here without any legal animadversion. For aught that appears, the prisoner may have been a Jew, a Mahometan, or a Socinian; and, if so, he had a right, by the Constitution, to declare his opinions. The offense charged in the indictment attacks only the Divinity of CHRIST. It is not an offense against religion in general; nor does it affect moral evidence nor destroy confidence in human testimony.

To this argument the counsel for the prosecu-

tion answered: that the common law of England, as it stood in 1776, was adopted by the Constitution and made part of the law of the State. Blasphemy and the contumelious reproaches of OUR SAVIOUR were punishable by the Common Law of England, not on account of there being in England an Established Church, but it was a principle coeval with the English law, and had stood unshaken amid the revolutions and changes in Church and State. Blasphemy is defined to be denying the Being or Providence of GOD; contumelious reproaches of CHRIST; profane scoffing at the Holy Scriptures, and exposing them to contempt and ridicule. The counsel cited four decided cases, whereby the Court of the King's Bench of England would not suffer it even to be debated that to write against Christianity in general was not an offense punishable at common law in the temporal courts. While the Constitution of the State has saved the rights of conscience, and allowed a free and fair discussion of all points of controversy among religious sects, it has left the principle

engrafted in the body of our Common Law that Christianity is part of the law of the State, untouched and unimpaired.

That great lawyer and erudite scholar, Chancellor Kent, then Chief Justice of that court, in delivering the unanimous judgment of the court in that case, said: —

"The single question is: whether this be a public offense by the law of the land. After conviction we must intend that these words were uttered in a wanton manner, and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion. The language was blasphemous, not only in a popular, but in a legal, sense; for blasphemy, according to the most precise definitions, consists in maliciously reviling GOD or religion, and this was reviling Christianity through its Author. Emlyn's Preface to the State Trials, p. 8. See, also, Whitlock's Speech, State Trials, vol. 2, p. 273. The jury have passed upon the intent, or *quo animo;* and, if these words spoken in any case will amount to a misdemeanor, the indictment is good.

"Such words, uttered with such a disposition, were an offense at common law. In Taylor's case (Ventris' Rep., p. 293; Keble's Rep., vol. 3, p. 607; Tremaine's Pleas of the Crown, 226), the defendant was convicted, upon information, of speaking similar words, and the Court of King's Bench said that Christianity was parcel of the law, and to cast contumelious reproaches upon it tended to weaken the foundation of moral obligation and the efficacy of oaths. And in the case of Rex *v.* Woolston (Strange's Rep., p. 834), on a like conviction, the court said: they would not suffer it to be debated whether defaming Christianity in general was not an offense at common law; for that *whatever strikes at the root of Christianity tends manifestly to the dissolution of civil government.* But the court were careful to say that they did not intend to include disputes between learned men upon particular controverted points. The same doctrine was laid down in the case of The King *v.* Williams, for the publication of Paine's Age of Reason; which case was tried before Lord Kenyon, in July, 1797.

The authorities show that blasphemy against GOD, and contumelious reproaches and profane ridicule of CHRIST or the Holy Scriptures (which are treated equally as blasphemy), are offenses punishable at common law, whether uttered by words or writings. Taylor's case, Ventris' Rep., p. 293; Blackstone's Commentaries, vol. 4, p. 59; Hawkin's Pleas of the Crown, vol. 1, b. 1, c. 5; East's Pleas of the Crown, vol. 1, p. 3; Tremaine's Entries, p. 225½, Rex *v.* Doyley. The consequences may be less extensively pernicious in the one case than in the other; but, in both instances, the reviling is still an offense, because it tends to corrupt the morals of the people and to destroy good order. *Such offenses have always been considered independent of any religious establishment or the rights of The Church. They are treated as affecting the essential interests of civil society.*

"And why should not the language contained in the indictment be still an offense with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the Common Law. We

stand equally in need, now as formerly, of all that moral discipline and of those principles of virtue which help to bind society together. The people of this State, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice; and to scandalize the Author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinctions between things sacred and profane; for, to use the words of one of the greatest oracles of human wisdom, 'profane scoffing doth by little and little deface the reverence for religion;' and he adds, in another place, 'Two principal causes have I known of atheism, — curious controversies and profane scoffing.' Lord Bacon's Works, vol. 2, pp. 291, 503. Things which corrupt moral sentiment,

as obscene actions, prints, and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; and shall we form an exception in these particulars to the rest of the civilized world? No government among any of the polished nations of antiquity, and none of the institutions of modern Europe (a single and monitory case excepted [1]), ever hazarded such a bold experiment upon the solidity of the public morals as to permit with impunity, and under the sanctions of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence with the ancient lawgivers and philosophers embraced the religion of the country. Digest, b. i., 10, 2;[2] Cicero, De Legibus, b. 2, *passim.*

[1] Revolutionary France of 1793.

[2] "*Jurisprudentia est divinarum atque humanarum rerum notitia.*" Cf. Justinian, *Institutes* lib. i., tit. i., sect. 1: "Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust." Therefore, the knowledge of divine things was necessary, as well as the knowledge of human things, to say what was law in its administrative sense; that is, relating to

"The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community is an abuse of that right. Nor are we bound by any expressions in the Constitution, as some have strongly supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet or

the whole mass of rights and duties protected and enforced by legal remedies. Cf., also, Bracton's *De Legibus et Consuetudinibus Angliæ*, vol. 1, b. i., chap. 3, p. 13, sect. 1 (edition by Sir Travers Twiss, Q. C., D. C. L., now in course of publication by authority of the Lords Commissioners of the Treasury, under the direction of the Master of the Rolls, 1878–1882): "We must see now what is law; and it is to be known that law is the common precept of prudent men in council, the coercion of offenses, which are committed voluntarily or through ignorance, and the common warrant of the body politic. Also GOD is the Author of justice, for justice is in the Creator, and accordingly right and law have the same signification." And, also, Hooker's (*Of the Laws of Ecclesiastical Polity*, b. i., xvi., 8) noble ascription to Law.

G. S.

of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and that the morality of the country is deeply engrafted upon Christianity, and not upon the doctrines or worship of those impostors. Besides, the crime is *crimen malitiæ:* and the imputation of malice could not be inferred from any invectives upon superstitions equally false and unknown. We are not to be restrained from animadversion upon offenses against public decency, like those committed by Sir Charles Sedley (Siderfin's Rep., p. 168), or by one Rollo (Sayer's Rep., p. 158), merely because there may be savage tribes, and perhaps semi-barbarous nations, whose sense of shame would not be affected by what we should consider the most audacious outrages upon decorum. It is sufficient that the common law checks upon words and actions dangerous to the public welfare apply to our case, and are suited to the condition of this and every other people, whose manners are refined, and whose morals have been elevated and inspired with a more enlarged benevolence by means of the Christian religion.

"Though the Constitution has discarded religious establishments, it does not forbid judicial cognizance of those offenses against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation and weaken the security of the social ties. The object of the 38th Article of the Constitution was to 'guard against spiritual oppression and intolerance,' by declaring 'the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should forever thereafter be allowed within this State, to all mankind.' This declaration (noble and magnanimous as it is, when duly understood) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law. It will be fully satisfied by a free and universal toleration, without any of the tests, disabilities, or discriminations incident to a religious establishment. To construe it as breaking down the

common law barriers against licentious, wanton, and impious attacks upon Christianity itself, would be an enormous perversion of its meaning. The *proviso* guards the article from such dangerous latitude of construction, when it declares that '*the liberty of conscience hereby granted* shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State.' This preamble and this *proviso* are a species of commentary upon the meaning of the article, and they sufficiently show that the framers of the Constitution intended only to banish test oaths, disabilities, and the burdens and sometimes the oppressions of Church establishments; and to secure to the people of this State freedom from coercion, and an equality of right on the subject of religion. This was no doubt the consummation of their wishes. It was all that reasonable minds could require, and it had long been a favorite object on both sides of the Atlantic, with some of the most enlightened friends of the rights of mankind, whose indignation had been roused by infringe-

ments of the liberty of conscience, and whose zeal was inflamed in the pursuit of its enjoyment. That this was the meaning of the Constitution is further confirmed by a paragraph in a preceding article, which specially provides that 'such parts of the Common Law as might be construed to establish or maintain any particular denomination of Christians, or their ministers,' were thereby abrogated.

"The legislative exposition of the Constitution is conformable to this view of it. Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law. The statute for preventing immorality (Laws of New York, vol. 1, p. 224; Revised Statutes, p. 675, sect. 69, *et seq.*) consecrates the first day of the week as holy time, and considers the violation of it as immoral. This was only the continuation in substance of a law of the Colony, which declared that the profanation of the LORD'S DAY was 'the scandal of the Christian Faith.' The act 'concerning oaths' (Laws of New York, vol. 1, p. 405; Revised Statutes, vol. 2, p. 407, sect. 82) rec-

ognizes the Common Law mode[1] of administering an oath, 'by laying the hand on and kissing the Gospels.' Surely, then, we are bound to conclude that wicked and malicious words, writings, and actions, which go to vilify those Gospels, continue, as at Common Law, to be an offense against the public peace and safety."

---

## B.

PAGE 61.

A CASE decided in South Carolina, by the Court for the Correction of Errors, was that of a man who was prosecuted, by the city council of Charleston for selling goods on the LORD'S DAY, or "Christian Sabbath." The court in pronouncing, upon appeal, judgment against the prisoner, said: "Crimes are classed into

[1] Cf. judgment of the English Court of Chancery (A. D. 1774) in case of Omychund *v.* Barker, reported in Atkyn's Reports, vol. I, p. 21; and in Smith's Leading Cases, with numerous additional adjudications, vol. I, pp. 195–210. G. S.

*mala in se* and *mala prohibita.* What gives them that character? . . . The law delivered at Mount Sinai may be by us appealed to as pointing out that which is '*evil in itself.*' Our law declares all contracts *contra bonos mores* illegal and void. What constitutes the standard of good morals? Is it not Christianity? There certainly is none other. Say that cannot be appealed to, and we do not know what would be good morals. In this State the marriage tie is indissoluble. Whence do we take that maxim? It is from the teaching of the New Testament alone. In the court over which we preside we daily acknowledge Christianity as the most solemn part of our administration. A Christian witness is sworn upon the Holy Evangelists, which testify of OUR SAVIOUR'S birth, life, death, and resurrection. This is so common a matter that it is little thought of as affording any evidence of the part which Christianity has in the Common Law. All blasphemous publications, carrying upon their face that irreverent rejection of GOD and His holy religion which make them dan

gerous to the community, have always been held to be libels, and punishable at Common Law . . . having no warrant of protection whatever in our Constitution. We agree fully to what is appropriately said in Updegraff *v.* The Commonwealth of Pennyslvania (11 Sergeant & Rawle's Rep. 394): 'Christianity, general Christianity, is, and always has been, part of the common law: not Christianity founded on any particular religious tenets; not Christianity with an Established Church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.' We have said all which need be said on this interesting subject. It was not necessary for the decision of the case: it has only been said *to prevent silence from being interpreted into a want of confidence in the proposition that Christianity may be justly appealed to as part of our Common Law.*"